ORIGINAL

No. 88-6613

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RICHARD BOYDE,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of California

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Do the Eighth and Fourteenth Amendments preclude a trial court from instructing a penalty phase jury in a capital case that, "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death," and does such an instruction require reversal of the resulting death sentence where the prosecutor urged the jury to apply the law and to weigh and balance the circumstances in aggravation against those in mitigation in determining the appropriate penalty?

2. Does a California sentencing proceeding violate Lockett v. Ohio (1978) 438 U.S. 586, and is the jury prevented from considering aspects of the defendant's character or record, where the jury is instructed to consider a list of possible aggravating and mitigating factors, as well as "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime," and all the defense evidence before the jury at the penalty phase related to the defendant's background and character and defense counsel argued at length for giving great weight to such evidence?

PARTIES

Petitioner, Richard Boyde, is a prisoner incarcerated under judgment of death at the California State Prison at San Quentin, California. Respondent is the State of California.

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OPINION BELOW

Petitioner seeks review of an opinion of the California Supreme Court affirming his judgment of death. (People v. Boyde (1988) 46 Cal.3d 212, 250 Cal.Rptr. 83, 758 P.2d 25.) The opinion of the California Supreme Court is attached as Appendix A to the petition.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. section 1257(3).

CONSTITUTION, STATUTES AND PROVISIONS INVOLVED

United States Constitution, Eighth and Fourteenth Amendments, and California Penal Code sections 190.2 and 190.3. These provisions appear in Appendix D to the petition.

STATEMENT OF THE CASE

Following a jury trial, petitioner Boyde was convicted of robbery (Cal. Pen. Code, § 211) and kidnapping for robbery (Cal. Pen. Code, § 209), and was found to have personally used a knife in perpetrating those offenses (Cal. Pen. Code, § 12022, subd. (b)) on a gas station attendant in Riverside on January 5, 1981. In addition, petitioner was convicted of robbery (Cal. Pen. Code, § 211), kidnapping for robbery (Cal. Pen. Code, § 209) and first degree murder (Cal. Pen. Code, §§ 187, 189) of the clerk in a 7-Eleven store in Riverside on January 15, 1981. The jury found two special circumstances true, i.e. murder during the commission of robbery (Cal. Pen. Code, § 190.2, subd. (a)(17)(i)), and murder during the commission of kidnapping for robbery (Cal. Pen. Code, § 190.2, subd. (a)(17)(ii). The jury also found that petitioner personally used a firearm in perpetrating all three offenses (Cal. Pen. Code, § 12022.5), and specially found that petitioner "personally killed [the victim] with express malice aforethought and premeditation and deliberation." (CT 367-379.)[1] The jury fixed the penalty as death. (CT 549.)

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1. "CT" refers to the Clerk's Transcript, while "RT" refers to the Reporter's Transcript.

On automatic appeal, the California Supreme Court affirmed the judgment, including the death penalty, in its entirety. The abstract of judgment was ordered corrected in a minor respect not pertinent to this petition. (People v. Boyde (1988) 46 Cal.3d 212, 250 Cal.Rptr. 83, 758 P.2d 25.) Petitioner's petition for rehearing was denied on November 9, 1988, in an unpublished order. (Attached as Appendix B to the petition).

STATEMENT OF FACTS

A. The Robbery and Kidnapping of Lon Creech

In the early morning hours of July 13, 1976, Lon Creech was the nightclerk at a 7-Eleven market located at 8703 Indiana Street in the city of Riverside. Mr. Creech had locked the door, in order to do some restocking. At approximately 3:30, a Black man knocked at the door, and Mr. Creech admitted him. A second man entered the store, pulled a gun, and stated, "This is a robbery." Mr. Creech subsequently identified the second man as petitioner Richard Boyde. Petitioner demanded money from the cash register, as well as Mr. Creech's watch, wallet, and keys. Mr. Creech gave each item to petitioner. Petitioner also wanted money from the store safe, but Mr. Creech did not have access to it. (RT 2315-2319.)

Mr. Creech was ordered outside, and was placed in the trunk of his car. Mr. Creech's car left the area of the store and was driven for between thirty to forty-five minutes. The car stopped, and petitioner and his companion were met by a second group of individuals. Petitioner Boyde stated they had just robbed a store, had the clerk in the trunk, and were deciding what to do with him. Petitioner mentioned the possibility of putting a .22 caliber bullet in Mr. Creech's head, or driving the car over a cliff with Mr. Creech in the trunk. The car was then driven about again for approximately one-half hour. Eventually the car stopped on a dirt road in an orange grove. Mr. Creech was taken from the trunk by petitioner and told to walk down the dirt road. Petitioner, gun

in hand, told Mr. Creech to kneel down. Petitioner was calm. Petitioner then asked Mr. Creech if he wanted a cigarette. Mr. Creech took one. Petitioner told Mr. Creek not to turn around. Petitioner then departed in Mr. Creech's car. (RT 2315-2325.)

On July 19, 1976, Officer William Edwards observed Mr. Creech's car and attempted to stop it. A high-speed chase ensued. Petitioner Boyde, the driver of the car, eventually abandoned the vehicle, but was subsequently captured and placed under arrest. (RT 2357-2364.)

Detective Jerry Knofflock of the Riverside Police Department interviewed petitioner after his arrest. Petitioner claimed he had borrowed Mr. Creech's car from a friend. In addition, Mr. Creech's watch was found on petitioner. Petitioner claimed he had purchased the watch from a friend for ten dollars. (RT 2371-2376.)

The parties stipulated that petitioner had pled guilty to the kidnapping of Lon Creech, and had been sentenced to state prison. (RT 2379-2380.)

B. The Robbery and Kidnapping of David Baker

On January 5, 1981, at approximately 2:00 a.m., David Baker was working at a "76" gasoline station at 1365 Blaine in the city of Riverside. At approximately that hour, petitioner entered the station, displayed two knives, and demanded money and Mr. Baker's watch. Mr. Baker turned over his money and watch. Petitioner then demanded that Mr. Baker open the station safe. Mr. Baker stated he could not. Petitioner and Mr. Baker went to Mr. Baker's car. Petitioner ordered Mr. Baker into the trunk. However, the trunk was too small and Mr. Baker was ordered instead to get in the driver's seat. Petitioner got into the passenger seat. (RT 2392-2403.)

The pair, at petitioner's direction, drove to a park. Petitioner ordered Mr. Baker out of the vehicle, and told him not to run because petitioner was very fast. The pair talked for a period of time, petitioner stating he did not know what to do with Mr. Baker. (RT 2403-2405.)

The men returned to the car and drove to a nearby doughnut shop. Petitioner purchased Mr. Baker a doughnut. The pair left the shop and got into Mr. Baker's car. When the car would not start, the men began walking. Eventually petitioner departed. (RT 2405-2409.)

C. The Robbery, Kidnapping, and Murder of Dick Gibson

On January 14, 1981, at approximately 11:15 p.m., Carolyn Baugh ended her shift, turned over the 7-Eleven store 8703 India Street to Dick Gibson, and departed. The store was in a normal condition. (RT 2382-2383.)

At approximately 1:00 a.m., Dennis Gibson visited his brother, Dick, at the 7-Eleven store. Dennis stayed until 1:40 a.m., then departed. (RT 2432-2436.)

John Cummings, owner of the 7-Eleven store at 8703 India Street, arrived at his store at 5:00 a.m. on January 15, 1981. Mr. Cummings found thirty-three dollars and Dick Gibson missing from the store. Mr. Cummings also noted a small hole in the store window which he had not noticed before. Ms. Baugh returned to the store in the morning, noticed the small hole, and stated it had not been there when she had left the store the night before. (RT 2383-2384, 2437-2440.) Mr. Cummings noted that it was store procedure to lock the door at 2:00 a.m., and to admit customers only at the clerk's discretion. (RT 2440-2441.)

On January 15, 1981, at approximately 7:30 a.m., George Snider was driving in the area of Cleveland and Monroe Streets in the city of Riverside, when he noticed what be believed was a body in the area of an orange grove some distance off the street. Mr. Snider got out of his vehicle and walked to within three to five feet of the body of Dick Gibson. Mr. Snider did not get near the head of the body. Mr. Snider was wearing size ten cowboy boots with a small heel and pointed toe. Mr. Snider drove to the 7-Eleven market at 8703 India Street to call the police, but found them already at the store. (RT 2843-2484.)

At approximately 7:30 a.m., Detective George Callow proceeded to the area where Dick Gibson's body had been found. The officer began to investigate the crime by examining the physical evidence at the scene. Near Mr. Gibson's head, the officer discovered a flat-soled left-shoe print. This shoe print was the one nearest Mr. Gibson's head. Mr. Gibson was wearing tennis shoes with a herringbone sole pattern. The officer also discovered prints left by Mr. Snider's cowboy boots, and several diamond-soled prints, all of which were below the waist level of Mr. Gibson's body and at least four-and-a-half feet away. The officer also found additional flat-soled prints that could not be accounted for by any shoe known to have been at the scene. (RT 2489-2508.)

An autopsy was performed on the body of Dick Gibson on January 16, 1981. The pathologist found a bullet wound above the right ear and a bullet wound in the forehead, surrounded by a fine peppering of dark spots. This powder residue indicated a gun shot fired closer than sixteen inches from the head, while the absence of such residue around the second wound indicated a shot from more than sixteen inches. The shot above the right ear entered the skull and fragmented. The bullet did not exit. The shot to the forehead did not penetrate the skull. Death resulted from the penetration wound to the right side of Mr. Gibson's head. Mr. Gibson could have lived several moments after the penetration wound and could have made gurgling or groaning sounds. (RT 2523-2542.)

The doctor also found fresh scrape-like wounds at the base of Mr. Gibson's left palm. (RT 2286.) The doctor found four or five abrasions in the skin of the victim's left palm, abrasions of the front part of the neck, and abrasions of the right and left knee. These knee abrasions were caked with dirt. The doctor also found a one-half inch long laceration on the left side of the back. (RT 2529-2530.) These wounds were consistent with someone falling while running and then kneeling at another location. (RT 2543-2524.) In addition, the doctor found a

gunshot wound to the small finger of the victim's left hand. The bullet had first grazed the fourth finger, before striking the fifth. (RT 2523-2527, 2535-2536, 2543-2545.)

On January 20, 1981, Detective Callow received a photograph of petitioner from a Deputy Knofflock. Callow, noting a resemblance between petitioner's photograph and a composite drawing prepared from the description of the robber of David Baker, prepared a photo line-up containing that photograph. The line-up was shown to David Baker, who picked out petitioner as the man who had robbed him. (RT 2570-2573.) A search warrant was obtained for petitioner's residence. At the residence, the officers placed petitioner under arrest and discovered Mr. Baker's watch, taken in the robbery, and clothing consistent with that described by Baker as being worn by the robber. (RT 2573-2575.)

Petitioner was taken to police headquarters. Petitioner was admonished; he waived his rights and agreed to speak to the officers. An interview was commenced with regard to the robbery of David Baker. Petitioner denied involvement, stating he purchased the watch for ten dollars from a "Moe," who looked like petitioner and to whom petitioner had loaned clothing that fit the description given by Baker. Detective Callow, understandably incredulous, told petitioner he had him. Petitioner agreed. (RT 2575-2580, 2582-2584.)

Petitioner stated to Detective Callow, "I can't go back to jail." Petitioner asked if there was anything he could do to keep from returning to prison. Detective Callow stated he could make no commitments. Petitioner asked what effect on his sentence would result from petitioner turning over information concerning a robbery. The officer stated petitioner had been arrested for kidnapping and robbery, and would have to have information concerning something far more serious before any consideration could be given to dealing with him. Petitioner then asked, "What if I have information about a murder?" (RT 2585-2587.)

Petitioner stated he had information concerning the murder of the football coach at the 7-11 market. Petitioner stated he had been at the residence of his nephew, Carl Franklin, at 2:30 or 3:00 in the morning, when Carl and a "Big Mike" arrived. "Big Mike" withdrew a .22 caliber gun from a paper bag, which also contained money. Petitioner noticed blood on "Big Mike's" hand. Petitioner asked his nephew where the money had come from, and "Big Mike" interrupted to state he was not sure they should say. Petitioner's nephew then replied they had robbed a 7-11 store on India Street, taken the clerk to an orange grove, and shot him. In response to these statements, attempts were made to discover more about the identity of "Big Mike" and Carl Franklin, but these attempts failed. (RT 2587-2593.)

Unable to locate either "Big Mike" or Carl Franklin, the officers again questioned petitioner. The officers told petitioner they did not believe he had been truthful. (RT 2627-2633.) Petitioner stated he had gone to the 7-11 market with "Big Mike" and Carl Franklin. Petitioner explained the three men had driven about, and Carl had eventually produced a .22 caliber revolver. The trio eventually drove to the 7-11 store on Indiana Street. Petitioner wanted to get a pack of cigarettes and something to drink. "Big Mike" told petitioner he would go in and pick up the merchandise. As Carl and petitioner sat in the car, petitioner saw the store clerk unlock the door and allow "Big Mike" to enter. Petitioner looked through the store window and saw "Big Mike" point the .22 caliber revolver at the clerk. After taking money from the cash register, "Big Mike" and the clerk exited the store and walked to the car. (RT 2627-2654.)

"Big Mike" opened the rear door of the car and ordered the clerk to get in the opposite rear door. The clerk started to enter the vehicle, then turned and ran. "Big Mike" fired a shot at the clerk, but missed. As "Big Mike" pursued him, the clerk fell to the ground. "Big Mike" and the clerk then returned to

the car. Petitioner asked "Big Mike" to let the clerk go. "Big Mike" said no and told Carl to drive to an orange grove near the store. The car stopped, and "Big Mike" ordered the clerk to get out of the car and get on his knees. Carl and petitioner stayed in the car, and saw "Big Mike" shoot the clerk. At the time he was shot, the clerk was on his knees, with his hands on top of his head. After the first shot, the clerk dropped his hands and turned partially around. "Big Mike" then fired a second shot and the clerk dropped straight forward to the ground. "Big Mike" rolled the clerk over and again, from point-blank range, shot the clerk in the head. (RT 2633-2654.)

"Big Mike" returned to the car. Petitioner asked to be taken home. Petitioner stated "Big Mike" was wearing tennis shoes. Petitioner stated he had on tennis shoes also, and Carl had on shoes called "croaker sacks." (RT 2657-2660.)

After additional questioning in which the officers indicated petitioner had revealed too much about the robbery not to have been at the store, petitioner admitted there was no such person as "Big Mike," and that he and Carl had committed the robbery. Petitioner stated the idea to commit the robbery was Carl's, and it was Carl who had got the gun. (RT 2731-2732.)

Petitioner stated that when he and Carl arrived at the 7-11, they were admitted by the clerk. Petitioner walked out the door after buying a package of cigarettes. Petitioner was aware Carl was going to rob the clerk. Petitioner looked back and saw Carl pull the gun, then heard him tell the clerk that he was being robbed. Carl ordered the clerk to place the money from the cash register in a paper bag. The man complied. Carl then ordered the clerk out of the store. Petitioner stated he did not know the clerk was going to be taken from the establishment. Petitioner got in the driver's seat of the car. The clerk got in the back seat, and Carl in the front passenger seat. The clerk jumped out of the car and ran. Carl fired a shot, but missed the man. As Carl pursued him, the clerk fell to the ground at least once and perhaps twice, allowing Carl to catch up to him. Carl

and the clerk returned to the car, and both got in the back seat. (RT 2657-2725.)

Petitioner drove to the area of an orange grove, where Carl told him to stop. Carl ordered the clerk from the car. Carl ordered the clerk to get on his knees and to put his hands over his head. Petitioner asked Carl what he was going to do, and Carl stated he did not know. Petitioner began to walk around and make sure no one else was in the area. Carl then fired a shot. The clerk took his hands from his head, and looked at his hand. Carl then fired a second shot into the back of the clerk's head. The clerk fell forward. Carl stated that he was not sure the man was dead and that he believed he should shoot the man again. Carl rolled the man over, stood over him, and fired a shot into the man's head. (RT 2725-2726.)

Petitioner stated the tennis shoes seized at petitioner's residence were not the ones he was wearing at the scene. The shoes he wore that night might be at Carl's house. (RT 2727.) Petitioner stated Carl had on a type of shoes called "croaker sacks." (RT 2728-2729.)

On January 23, 1981, a search warrant was served on the residence of Carl Franklin Ellison. In the house, the officers found a loaded .22 caliber revolver and two pair of tennis shoes. (Peo. Exhs. 21-1, 21-2.) (RT 2744-2753.)

Criminalist Linda Harstrom, in January, 1981, received from the pathologist bullet fragments taken from the forehead of Dick Gibson. Ms. Harstrom examined these fragments and determined they were consistent with copper-washed .22 caliber long rifle bullets. The doctor also gave Ms. Harstrom metal fragments associated with the wound to the rear of Mr. Gibson's head. These fragments were also consistent with a copper-washed .22 caliber bullet. (RT 2761-2764.)

On January 30, 1981, Ms. Harstrom examined the Buick Electra automobile owned by Carl Ellison's mother. Specifically, Ms. Harstrom compared the tire treads of that vehicle to the tire tracks left at the scene of Mr. Gibson's murder. The right rear

tire of that vehicle was consistent in all respects with the tread pattern impressions found at the scene. The right rear tire of Mr. Ellison's vehicle was an off-brand, whose manufacture could not be determined. (RT 2766-2771, 2825-2826.)

Ms. Harstrom also compared the tread pattern on the tennis shoes seized at the Ellison residence to the tennis-shoe tread pattern found at the scene. Ms. Harstrom was able to determine that one pair could not have made the impressions found, but that the other shoe was consistent with, and had no dissimilarities to, the tennis-shoe pattern found near Mr. Gibson's body. (RT 2771-2778.)

Ms. Harstrom measured the flat-soled shoe print found near Mr. Gibson's head, and estimated it was made by a shoe ranging in size from 7 to 9. The print could not have been made by a size 13 shoe. The tennis shoe taken from Mr. Ellison's residence was consistent with the tennis-shoe print found at the scene, and was a size 13. (RT 2780-2785.) Both petitioner's and Ellison's feet were measured. Ellison's foot size was 13, while petitioner's was 9 1/2. (RT 2890-2891.)

Otharaean Owens, the mother of Carl Ellison and half-sister of petitioner, stated Ellison lived with her. Ms. Owens stated that, on January 15, 1981, Ellison was eighteen years old, and petitioner was twenty-four. Ms. Owens stated the .22 caliber revolver seized at her residence belonged to her. (RT 2823-2856.) Mrs. Owens saw petitioner while he was in jail and asked him why he had done this to her son. Petitioner told her Ellison was not involved. (RT 2832-2833.)

Codefendant Ellison testified at trial that it was petitioner and not Ellison who conceived the idea for the 7-Eleven robbery, and who shot the victim. (RT 2962-2992.) Ellison testified that he had lied in his earlier statements to the police, wherein Ellison had accepted responsibility for shooting the victim. In his later statement to the police, Ellison stated that petitioner had shot the victim. Ellison stated that he had lied earlier because he loved his uncle, did

not want him to go back to prison and wished to protect him. (RT 2996-2999, 3249-3272.)

SUMMARY OF RESPONDENT'S ARGUMENT

Instructing the jury it "shall" impose the death penalty if aggravating circumstances outweighed mitigating circumstances and "shall" impose life without possibility of parole if mitigating circumstances outweighed aggravating circumstances, did not create a mandatory death penalty, nor did it prevent the jury from making an individualized determination of penalty in petitioner's case. Such an instruction does not violate the federal Constitution, because the jury under California law has broad discretion to determine what factors it finds to be in aggravation and mitigation, and broad discretion to then weigh and balance those factors in determining the appropriate penalty in the exercise of its broad discretion. Rather than providing for some type of mandatory death penalty, or preventing individualized determination of penalty, the instructions provide the jury with guided discretion, consistent with past decisions of this Court.

Moreover, the California Supreme Court correctly concluded that petitioner's jury properly understood its obligation in this case.

The instructions given provided the jury with guided discretion in determining the appropriate penalty, and did not prevent the jury from considering any mitigating evidence in the case.

Moreover, the California Supreme Court correctly concluded that since all the defense evidence at the penalty phase in this case related to petitioner's background and character, and defense counsel argued at length for giving great weight to such evidence, while the prosecutor argued only the weight to be given the evidence and did not assert its irrelevancy, the jury could not have been misled by the "factor (k)" catchall instruction into thinking background and character evidence was irrelevant to its determination of penalty.

ARGUMENT

I

THE "SHALL" PORTION OF CALJIC INSTRUCTION 8.84.2 DID NOT CREATE A MANDATORY DEATH PENALTY, NOR DID IT PREVENT THE JURY FROM MAKING AN INDIVIDUALIZED DETERMINATION OF PENALTY, BECAUSE THE JURY HAD BROAD DISCRETION TO DETERMINE THE FACTORS IN AGGRAVATION AND MITIGATION AND THEN TO WEIGH AND BALANCE THOSE FACTORS IN DETERMINING THE APPROPRIATE PENALTY IN THE EXERCISE OF ITS DISCRETION

Petitioner objects to the language in CALJIC No. 8.84.2 stating that the jury "shall" impose the death penalty if it finds the aggravating factors outweigh the mitigating factors.

First, we observe that the entire instruction challenged by petitioner was as follows:

> "It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.
>
> "After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole." (CT 538; RT 4836.)

The jury was then given an extensive list of possible aggravating and mitigating circumstances, the last of which told the jury it could consider "any other" circumstance in mitigation, whether or not it constituted a legal excuse for the crime. (CT 541-542; RT 4831-4833.)

The fact that the jury was instructed it "shall" return a verdict of death if, after weighing the circumstances in aggravation and mitigation it concluded the circumstances in aggravation outweighed those in mitigation, did not make the penalty verdict a "mandatory" penalty under this Court's decisions.

This Court has recognized that states are entitled to considerable discretion in determining how to structure a capital sentencing scheme. The only federal limitations are those required by the United States Constitution. (Cabana v. Mississippi (1986) 474 U.S. 376, 386. There are "two central principles of our Eighth Amendment jurisprudence." (California v. Brown (1987) 479 U.S. 538, 544 (O'Connor, J., conc.) The first requires limiting and guiding the discretion to impose the death penalty so as to minimize the risk of wholly arbitrary and capricious action. (Gregg v. Georgia (1976) 428 U.S. 153, 189.) The second is that the sentencing body must be able to consider any relevant mitigating evidence regarding the defendant's character or background, and the circumstances of the particular offense. (California v. Brown, supra, 479 U.S. at p. 544 (O'Connor, J., concurring).)

Jury instructions are examined from the perspective of how a "reasonable jury" would understand and apply them. (Mills v. Maryland (1988) 486 U.S.___, 100 L.Ed.2d 384.

The whole point of this Court's decisions in Gregg, Proffitt, and Jurek (Gregg v. Georgia, supra, 428 U.S. 153; Proffitt v. Florida (1976) 428 U.S. 242; Jurek v. Texas (1976) 428 U.S. 262), is that the decision to impose death must be guided in a specific way and cannot be arbitrary and capricious. (See, Barclay v. Florida (1983) 463 U.S. 939.) However, petitioner's suggestion that the jury be allowed free reign to decide what penalty is appropriate after it finds the aggravating circumstances outweigh the mitigating circumstances would result in arbitrary and capricious decision making. This is improper.

Consequently, it is constitutionally permissible to give the jury consideration of a broad scope of evidence, give it various categories of aggravating and mitigating circumstances, give the jury broad discretion to determine what constitutes circumstances in aggravation and mitigation in a given case, as well as broad discretion in deciding for itself how to weigh and balance the factors in aggravation against those in mitigation, and then advise it that if it finds the aggravating circumstances outweigh the mitigating circumstances it shall impose the death penalty.

This Court has held a death penalty based on affirmative answers to specific questions (deliberate acts and future dangerousness) by the jury does not violate the Eighth Amendment, because it does not prevent the jury from considering any relevant mitigating evidence in the case in view of an instruction that the jury arrive at its verdict based on all the evidence. (Franklin v. Lynaugh (1988) 487 U.S. ___, [101 L.Ed.2d 155, 159-160; see also Jurek v. Texas, supra, 428 U.S. 262.) California's procedure provides the jury with much broader discretion than the Texas procedure which has been upheld by this Court, since in California the jury has discretion to decide what the circumstances in aggravation and mitigation are and has broad discretion to balance those factors in arriving at an individualized determination of penalty in a given case. Moreover, pursuant to California Penal Code section 190.3, petitioner's jury was expressly invited to consider other extenuating circumstances than are expressly provided for under Texas law.

Contrary to petitioner's contention, the instruction told the jury to weigh, not simply to mechanically add, circumstances in aggravation against those in mitigation, and to impose death "[i]f you conclude that the aggravating circumstances outweigh the mitigating circumstances . . ." (CT 538, RT 4836; emphasis added.) The instruction does not permit a simple mechanical adding and comparison of factors in aggravation

and mitigation. Instead, it requires the jury to engage in a weighing process, which necessarily involves a qualitative determination of the relative weights the jurors choose, in the exercise of their discretion, to assign to various factors shown by the evidence in the case.

As the California Supreme Court reiterated in this case:

> "In People v. Brown, supra, 40 Cal.3d at pages 538-545, we concluded that the directive of section 190.3 that the trier of fact 'shall impose a sentence of death' if it 'concluded that the aggravating circumstances outweigh the mitigating circumstances' did not impermissibly restrict the jury's sentencing discretion. We rejected the defendant's proffered mechanistic construction of the words 'outweigh' and 'shall' in favor of one which directed the jury to weigh the various factors and determine under the relevant evidence which penalty is appropriate in a particular case." (People v. Boyde (1988) 46 Cal.3d at p. 252.)

Under the challenged instruction it is the jury which decides where the balance lies. There is nothing "mandatory" either about the process or about the result reached in any given case. Nothing in this, or any of the other instructions, suggested or required that the jury come to a particular conclusion on the appropriate penalty. Nothing in this instruction prevented the jury from determining that any given circumstance or circumstances in mitigation outweighed, in the exercise of the jury's discretion, any or all of whatever factors the jury determined, in the exercise of its discretion, were in aggravation.

The jury was told it was to "consider, take into account and be guided by" the applicable factors of aggravating and mitigating circumstances upon which it had been instructed.

The jury was left free to judge the quality of each factor and to assign it whatever weight it felt appropriate.

As the California Supreme Court stated in this case:

"In the present case, both the prosecutor and defense counsel repeatedly told the jury that the weighing process was just that, not a counting process, and that one mitigating circumstance could outweigh a number of aggravating circumstances. They also made it clear that the jury was free to assign whatever weight it wanted to any particular factor." (People v. Boyde supra, 46 Cal.3d at p. 253.)

Petitioner's federal constitutional claim is without merit.

Petitioner attempts to confuse the federal constitutional issue by reliance on the "concerns" identified by the California Supreme Court in People v. Brown (1985) 40 Cal.3d 512. The California Supreme Court acknowledged in Brown that the phrase "shall impose a sentence of death" might "leave room for some confusion as to the jury's role," but has rejected the claim that the 1978 statute unconstitutionally authorized a mandatory death penalty. (Ibid.; reversed on other grounds in California v. Brown, supra, 479 U.S. 538.)

The California Supreme Court has further held that a death judgment is invalid under the Eighth Amendment if imposed by a sentencer that believed it lacked ultimate moral responsibility to determine what penalty is appropriate under all the circumstances of the case. (People v. Melton (1988) 44 Cal.3d 713, 761, 244 Cal.Rptr. 867, 750 P.2d 741.) At the same time, jurors are not to receive such unbridled discretion that arbitrary decisions are likely. (Furman v. Georgia (1972) 408 U.S. 238.)

As the California Supreme Court clearly explained in this case:

"Our concerns in Brown were essentially two: The first was that the jury might be confused about the

nature of the weighing process, that it is not a mere mechanical counting of factors on each side of an imaginary scale but rather a mental balancing process. Our second concern was that use of the word 'shall' might mislead the jury as to the substance of the ultimate determination it was called upon to make. In Brown, we concluded that the statutory language 'should not be understood to require any juror to vote for the death penalty unless, upon completion of the 'weighing' process, he decides that death is the appropriate penalty under all the circumstances. Thus, the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.' (40 Cal.3d at p. 541.)

"In the present case, both the prosecutor and defense counsel repeatedly told the jury that the weighing process was just that, not a counting process, and that one mitigating circumstance could outweigh a number of aggravating circumstances. They also made it clear that the jury was free to assign whatever weight it wanted to any particular factor." Although the prosecutor argued that the jury was obliged (i.e., it 'shall') to return a death verdict if it found that the aggravating factors outweighed the mitigating even slightly, he also told the jury that its ultimate determination was: 'Is this the case, is this the kind of case as I am guided by these factors that warrants the death penalty.' In his final summation, the prosecutor stated, 'and the point now becomes, and the only question is, should it [the death penalty] be or should it not be imposed.' Defense counsel also made it clear the ultimate penalty was the jury's choice: 'Can (k) outweigh (a) through (j)? If you find that it

does, it does, and that is your choice. That is what we are asking you to do.'

"In our view, the Brown concerns were satisfied here. The jury was clearly informed that the word 'weigh' did not connote mere counting, but rather involves a qualitative judgment. The jury was also adequately informed as to its discretion in determining whether death was the appropriate penalty. Obviously, when jurors are informed that they have discretion to assign whatever value they deem appropriate to the factors listed, they necessarily understand they have discretion to determine the appropriate penalty. The task of assigning weights is not an arid exercise performed in a vacuum; it is the very means by which the jury arrives at its qualitative and normative decision as to the appropriate penalty. We recognized this in Brown, where we explained: 'Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider, including factor 'k' as we have interpreted it. [Fn.] By directing that the jury 'shall' impose the death penalty if it finds that aggravating factors 'outweigh' mitigating, the statute should not be understood to require any juror to vote for the death penalty unless, upon completion of the 'weighing' process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines, under the relevant evidence which penalty is appropriate in the particular case.' (40 Cal.3d at p. 541, italics added.)" (People v. Boyde, supra, 46 Cal.3d at pp. 253-254.)

It is manifest from what the California Supreme Court has said that under California law the jury makes an individualized determination of penalty, and did so in this case.

Petitioner objects to use of the word "shall" in CALJIC No. 8.84.2, claiming that word somehow creates a duty to return a verdict of death. However, "shall" is also used in the portion of the instruction dealing with life confinement. (CT 538; RT 4836.) The instruction is equally balanced in that it likewise tells the jury it "shall" determine the penalty to be life imprisonment without parole if it concludes the circumstances in mitigation outweigh those in aggravation. Use of "shall" equally to describe both options could not possibly be misconstrued by a reasonable juror to mean one option should be chosen over the other. Moreover, use of "shall" merely mirrors the language of Penal Code section 190.3, which states the trier of fact shall take into account various relevant factors. Petitioner's contention such language may create a situation where the jury is obligated to impose the death penalty when it finds the aggravating circumstances outweigh the mitigating circumstances, even though it does not believe the aggravation is sufficient to justify death, makes no sense. Initially, it would be factually impossible for a jury to conclude the aggravating circumstances outweighed the mitigating circumstances and yet subjectively feel the death penalty was not warranted. Under CALJIC No. 8.84.1(k) the jury could consider any fact it wished to mitigate the crime and not impose the judgment of death. Given this fact, it is absurd to suggest that in spite of subsection (k), the jury would find the aggravating circumstances outweighed the mitigating circumstances and then still decide the death penalty was inappropriate.

Moreover, any modification to the instruction here would probably violate the federal constitution.

"'. . . [D]iscretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' Gregg v. Georgia, 428 U.S. 153, 189 (1976). . . ." (Zant v. Stephens (1983) 462 U.S. 862, 874.)

The language in CALJIC No. 8.84.2,

". . . was directly taken from the 1978 death penalty law and accurately describes the jury's function under that law: to weigh the applicable aggravating and mitigating factors and, on that basis, and that basis alone, to determine whether death is an appropriate remedy." (People v. Hendricks (1988) 44 Cal.3d 635, 654, 244 Cal.Rptr. 181, 749 P.2d 836; emphasis in original.)

Where the record demonstrates that the jury fully understood that it could assign whatever weight it thought appropriate to the factors in aggravation and mitigation and that it should base its penalty determination on all of the evidence in the case, use of the word "shall" in the instructions and argument does not compel a finding that the jury was misled "from an otherwise assumed proper understanding of its duty to determine appropriateness of death through the weighing process." (People v. Hendricks, supra, 44 Cal.3d at p. 655.)

Thus, petitioner's contention in this regard is meritless not only as a matter of federal constitutional law, but also based upon the California Supreme Court's construction of California law. (See, People v. Harris (1981) 28 Cal.3d 935, 963-964, 171 Cal.Rptr. 679, 623 P.2d 240.)

This Court recently denied certiorari on this same issue in Hamilton v. California, No. 88-5746, cert. denied Jan. 23, 1989 ___U.S.___, as petitioner backhandedly concedes. In an attempt to avoid the impact of the denial of certiorari on this identical issue in Hamilton v. California, supra, petitioner argues that his case offers a particularly "compelling context" for resolution of the issue.

It is noteworthy, however, that petitioner does not argue that the issue is in fact any different from that on which this Court very recently denied certiorari in Hamilton.

As for the alleged "compelling context" of the present case, petitioner argues that in Hamilton the jury was further instructed that it must be convinced "beyond a reasonable doubt"

that the aggravating factors prevailed in order to impose the death penalty. But this is not a constitutional requirement. Indeed, petitioner does not so much as argue that a "beyond a reasonable doubt" instruction is constitutionally required. The fact that it was given in Hamilton does not, therefore, change the nature of the constitutional issue presented by the petition in this case.

Lacking any other support for his argument, petitioner attempts to rely on statements of the prosecutor to show that the jury was unduly limited in its consideration of penalty.

First, he refers to two statements of the prosecutor in argument to the jury. In the first, the prosecutor quite properly noted that there was no requirement that the jury find "beyond a reasonable doubt" that the circumstances in aggravation outweighed those in mitigation. (Petn. at p. 11, citing RT 4767.) Significantly, the prosecutor affirmed to the jury what is constitutionally required, i.e. that, "It is merely a question of weighing." (RT 4767; emphasis added.) There was nothing improper in the prosecutor's statement.

In the next statement referred to by the prosecutor, petitioner argues that the following statement of the prosecutor suggested "an unduly narrow focus on the jury's part" when it came to the "weighing" process.

"If you find that the aggravating factors outweigh, and it can be a slight outweigh, it will be your obligation to return a verdict of death." (Petn. at p. 11, citing RT 4767; emphasis added by petitioner.)

This statement provides no basis for overturning the sentence in this case. The statement in fact reaffirms that it is "you," i.e. the jury (not the prosecutor or the court or the Legislature or anyone else) which had the "obligation" to find and weigh the factors in aggravation and mitigation, and that same "obligation" meant that the jury should return whatever verdict it reached as a result of that weighing process, rather than arbitrarily rejecting it and returning a verdict which was

not the product of its weighing process. The prosecutor further noted that "it can be a slight outweigh," but again the verdict to be returned was for the jury's ultimate determination.

As the California Supreme Court concluded on this point:

> "Although the prosecutor argued that the jury was obliged (i.e., it 'shall') to return a death verdict if it found that the aggravating factors outweighed the mitigating even slightly, he also told the jury that its ultimate determination was: 'Is this the case, is this the kind of case as I am guided by these factors that warrants the death penalty.' In his final summation, the prosecutor stated, 'and the point now becomes, and the only question is, should it [the death penalty] be or should it not be imposed.' Defense counsel also made it clear the ultimate penalty was the jury's choice: 'Can (k) outweigh (a) through (j)? If you find that it does, it does, and that is your choice. That is what we are asking you to do.'"
>
> (People v. Boyde, supra, 46 Cal.3d at p. 253.)

Petitioner further relies on statements to certain jurors during individual sequestered voir dire prior to the start of trial. However, as the California Supreme Court observed, to the extent they deserve consideration at all (since they came during voir dire examination of individual jurors at the outset of the case, before the jury had been instructed on the law by the court) the comments, considered in context, were the result of "the prosecutor's contrasting the current death penalty law with the former one that was unconstitutional for lack of standards governing the jury's exercise of discretion in sentencing. (See Furman v. Georgia (1972) 408 U.S. 238.) He was attempting to explain that the current law does not leave jurors 'rudderless,' but instead provides concrete standards to guide the jury's exercise of discretion." (People v. Boyde, supra, 46 Cal.3d at p. 254 (fn. 6.)

The prosecutor's concern was that the jury exercise its discretion within the guidelines of the law, rather than in some arbitrary fashion which was not the result of the weighing process prescribed by California law.

The California Supreme Court correctly concluded in this regard:

> "The dissent also mistakenly faults the prosecutor for urging the jurors to base their decision on the evidence presented as measured by the guidelines set forth in the court's instructions rather than by simply consulting their personal feelings. The prosecutor's exhortations did no more than urge the jurors to limit the 'sentencing considerations to record evidence,' a completely proper request according to the United States Supreme Court in California v. Brown, supra, 479 U.S. at page ___ [93 L.Ed.2d at p. 941.]. We find no impropriety in such argument. It is a misinterpretation of the prosecutor's argument to assert, as the dissent does, that he was telling the jury it had no discretion to determine the appropriate penalty. We conclude that the jury was adequately informed that the manner in which it weighed mitigating versus aggravating circumstances was in its sole discretion and that it thereby determined whether death was appropriate." (People v. Boyde, supra, 46 Cal.3d at pp. 254-255.)

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II

THE INSTRUCTIONS PROVIDED THE JURY WITH GUIDED DISCRETION IN DETERMINING THE APPROPRIATE PENALTY, AND DID NOT PREVENT THE JURY FROM CONSIDERING ANY MITIGATING EVIDENCE IN THIS CASE

Petitioner next contends that the jury was improperly restricted by CALJIC 8.84.1 in its consideration of circumstances in mitigation of penalty, in violation of principles expressed in Lockett v. Ohio (1978) 438 U.S. 586. Petitioner argues that the jury instruction he challenges is improper, because it refers to "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime," and thereby purportedly precluded the jury from considering evidence in mitigation which related to petitioner's background and character.

Petitioner's contention involves an unduly narrow construction of the instruction and of California law, and ignores the fact that the California Supreme Court concluded that petitioner's jury could not have been misled under the particular circumstances of petitioner's case, since the only defense evidence before the jury on penalty consisted of background and character evidence.

Here, the jury was first told in CALJIC 8.84.1 ("penalty trial--factors for consideration") that in determining penalty it was to consider "all of the evidence which has been received during any part of the trial of this case." (CT 541; RT 4831.) The jury was then told in the same instruction [2] to

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2. CALJIC No. 8.84.1, as given in the instant case, provided:

"In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account and be guided by the following factors, if applicable:

"(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.

"(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied

consider a list of several possible aggravating or mitigating circumstances, as well as any other circumstances which extenuated the gravity of the crime whether or not they might technically constitute "a legal excuse" for the crime. (CT 541-542; RT 4832-4833.) The jury was further told in the very next instruction that "extenuate" "means to lessen the seriousness of a crime as by giving an excuse." (CT 543; RT 4833; emphasis added.)

Consideration of compassion as a mitigating factor was, therefore, expressly allowed. The jury knew it could consider "any" possible circumstances in mitigation under the catch-all "factor (k)" portion of the instruction, even circumstances that did not constitute any kind of "legal excuse" for the crime. A

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threat to use force or violence.

"(c) The presence or absence of any prior felony conviction.

"(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

"(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or expectation for his conduct.

"(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

"(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the affects of intoxication.

"(i) The age of the defendant at the time of the crime.

"(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

"(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (See, Cal. Pen. Code, § 190.3.)

review of Lockett v. Ohio, supra, 438 U.S. 586, demonstrates why this instruction was constitutionally appropriate.

Lockett v. Ohio, supra, in a plurality opinion, held that the Ohio death penalty statute was unconstitutional under the Eighth and Fourteenth Amendments of the United States Constitution because the statute required the death penalty where one or more factors in aggravation were proven unless outweighed by evidence in mitigation, which had to fit within one of three specific categories. Lockett compared the Ohio statute with those upheld in Gregg v. Georgia (1976) 428 U.S. 153, and Proffitt v. Florida (1976) 428 U.S. 242, and found that the Ohio Statute, in contrast to those in Gregg and Proffitt, violated the Eighth and Fourteenth Amendments since it precluded the consideration as a mitigating factor of any relevant aspect of the defendant's character or record or any of the circumstances of the offense. (Lockett v. Ohio, supra, at pp. 604-607.)

In contrast to the instruction in Lockett v. Ohio, supra, the jury instruction in the instant case, CALJIC No. 8.84.1, meets the constitutional standards set forth in Lockett, supra. The Ohio statute in Lockett contained eight fewer categories and completely lacked the kind of catchall category contained in section (k). In its first sentence, CALJIC No. 8.84.1 instructs the jury that the mitigating factors are essentially unlimited since they can be derived from "all of the evidence which has been received during any part of the trial of this case. . . ." (Emphasis added.) In addition, the eleventh of the special categories given to the jury (section (k)) is a broad catchall category providing that the jury can consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (Emphasis added.) These factors necessarily include the offender and compassion.

Furthermore, California v. Ramos (1983) 463 U.S. 992, found no constitutional infirmity in California Penal Code section 190.3. Since the wording of that code section is

identical to the wording of CALJIC No. 8.84.1(k), the instruction likewise does not violate Lockett. The language of the instruction necessarily allows the jury to consider the offender and compassion since the jury sets the penalty after considering mitigating factors drawn from all evidence and "any other circumstance" in mitigation, whether or not it constitutes "a legal" excuse.

Thus, unlike the situation in Lockett, in California the jury can consider any of the evidence presented at any phase of the trial and any extenuating circumstance as factors in mitigation. Certainly, compassion and the individual worth of the defendant fall within this catchall category of section (k). The instruction allowed the jury to treat petitioner as an individual. (See, Lockett v. Ohio, supra, 438 U.S. at p. 605.) It did not prevent the jury from considering any relevant, mitigating evidence in the case. (See, Franklin v. Lynaugh, supra, 101 L.Ed.2d at p. 160.) Thus, there was no risk the death penalty would be imposed in spite of the hypothetical existence of factors allegedly calling for a less severe penalty.

Moreover, petitioner's contention ignores the determination of the California Supreme Court that petitioner's jury could not reasonably be thought to have been confused about this matter since the jury was expressly instructed to consider "all of the evidence which has been received during any part of the trial of this case" in determining whether there were factors in mitigation, and since "[a]ll of the defense evidence at the penalty phase related to Boyde's background and character." (People v. Boyde, supra, 46 Cal.3d at p. 251.)

Petitioner offered over two volumes of evidence in his behalf at the penalty phase, including evidence that he had a deprived childhood, was of low intelligence, a hard worker, a good husband and father and generous to his friends. Evidence was also received in his behalf at the penalty phase from a psychologist who testified he was not the type of person who would deliberately kill another. (RT 4301-4746.)

As the California Supreme Court concluded, it is "inconceivable" (People v. Boyde, supra, 46 Cal.3d at p. 251) that the jury could have ignored all the evidence presented by the defense at the penalty phase, in violation of the court's express instruction to consider all the evidence before it. Moreover, as the California Supreme Court further noted,

> "Although the prosecutor argued that in his view the evidence did not sufficiently mitigate Boyde's conduct, he never suggested that the background and character evidence could not be considered. Defense counsel argued at length for giving great weight to defendant's troubled background and personality deficiencies and referred to factor (k) as the catchall provision. It is inconceivable the jury would have believed that, though it was permitted to hear defendant's background and character evidence and his attorney's lengthy argument concerning that evidence, it could not consider that evidence." (People v. Boyde, supra, 46 Cal.3d at p. 251.)

* * *

CONCLUSION

Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. 88-6613

RICHARD BOYDE (Petitioner or Appellant) vs. THE STATE OF CALIFORNIA (Respondent or Appellee)

The Clerk will enter my appearance as Counsel of Record for RESPONDENT, STATE OF CALIFORNIA

(Please list names of all parties represented)

who IN THIS COURT is ☐ Petitioner(s) ☒ Respondent(s) ☐ Amicus Curiae ☐ Appellant(s) ☐ Appellee(s)

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature Frederick R. Millar Jr.

(Type or print) Name FREDERICK R. MILLAR, JR.

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ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE. THAT ATTORNEY WILL BE THE ONLY ONE NOTIFIED OF THE COURT'S ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES MAY FILE AN APPEARANCE FORM.

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED.

CO-73A

AFFIDAVIT OF SERVICE BY MAIL

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No: 88-6613
October Term, 1988

RICHARD BOYDE,
Petitioner,
v.
STATE OF CALIFORNIA,
Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within RESPONDENT IN OPPOSITION as follows: To Joseph F. Spaniol, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 9 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

Dennis A. Fischer
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Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 6 day of March, 1989.

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I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, March 6th, 1989.

Eileen Unsworth
EILEEN UNSWORTH.

Subscribed and sworn to before me
this 6th day of March, 1989.

Betty A. Hitchingham
Notary Public in and for said County and State

BETTY A. HITCHINGHAM
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Oct. 17, 1991